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UNILATERAL ACTS OF STATES

Report of the Working Group

1. In the report on the work of its forty-eighth session, the International Law Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law. 1/

2. The General Assembly, in resolution 51/160, invited the Commission to examine the topic "Unilateral acts of States" and to indicate its scope and content, in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to submit.

3. At its 2477th meeting, held on 15 May 1997, the Commission established a Working Group on this topic. 2/ The Group held 3 meetings between 22 May and 26 June 1997.

1/ See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), p. 230 and pp. 328-329.

2/ Mr. E. Candioti (Chairman), Mr. J. Baena Soares, Mr. J. Dugard, Mr. C. Economides, Mr. L. Ferrari Bravo, Mr. N. Elaraby, Mr. G. Hafner, Mr. Q. He, Mr. I. Lukashuk, Mr. V. Rodriguez Cedeño, Mr. R. Rosenstock, Mr. B. Sepúlveda and Mr. Z. Galicki (ex officio).

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4. The Group bore in mind the "General outline" for the study of unilateral acts of States submitted by the Commission in annex II, addendum 3, to its report on the forty-eighth session, 3/ as well as the summary records of the debate in the Sixth Committee at the fifty-first session of the General Assembly. 4/

I. Advisability and feasibility of the study

5. The Working Group took the view that consideration by the International Law Commission of "unilateral acts by States", with a view to initiating work on the codification and progressive development of the applicable legal rules, is advisable and feasible, bearing in mind, inter alia, the following reasons:

In their conduct in the international sphere, States frequently carry out unilateral acts with the intent to produce legal effects. The significance of such unilateral acts is constantly growing as a result of the rapid political, economic and technological changes taking place in the international community at the present time and, in particular, the great advances in the means for expressing and transmitting the attitudes and conduct of States; State practice in relation to unilateral legal acts is manifested in many forms and circumstances, has been a subject of study in many legal writings and has been touched upon in some judgments of the International Court of Justice and other international courts; there is thus sufficient material for the Commission to analyse and systematize. In the interest of legal security and to help bring certainty, predictability and stability to international relations and thus strengthen the rule of law, an attempt should be made to clarify the functioning of this kind of acts and what the legal consequences are, with a clear statement of the applicable law.

II. Scope and content of the topic

6. In the light of the General Assembly's request in operative paragraph 13 of resolution 51/160, the Working Group concentrated on determining the scope and content of the topic.

A. Scope

7. The conduct of States in the international sphere is constantly seen in individual initiatives and unilateral actions with many objectives, forms and

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3/ Document A/51/10, pp. 343-347.

4/ Document A/CN.4/479, para. 96.

types of content. This conduct encompasses political, economic, cultural, social, defence, security and other action, in other words, the whole range of activities whereby each State expresses itself and operates in its external relations. The Working Group's first task was, therefore, to endeavour to delimit the subject of study, in other words, to establish what kind of unilateral acts by States should be the subject of attention.

8. The Group bore in mind that, in the General Scheme included in annex II to the report on its forty-eighth session, the Commission basically characterized the subject of study as unilateral acts of States that have consequences relating specifically to the sphere of international law. 5/ This framework is repeated in the General Outline submitted in addendum 3 to the annex. 6/

9. Accordingly, the topic is the unilateral acts of States that are intended to produce legal effects, creating, recognizing, safeguarding or modifying rights, obligations or legal situations. The study should therefore rule out those State activities which do not have such legal consequences. It would also seem appropriate to rule out, at the same time, questions pertaining to the definition and consequences of internationally wrongful acts, inasmuch as they are studied under the heading of international responsibility.

10. The fundamental characteristic of unilateral legal acts is, logically, their unilateral nature. They emanate from one single side (from the Latin "latus"), in other words, from one or several subjects of international law acting "unilaterally" and the participation of another party is not required. This characteristic, which is to be seen both in the structure and in the object and content of the act, leaves "plurilateral" international legal acts, such as treaties, outside the scope of the study. But it does not exclude so-called "collective" or "joint" acts, inasmuch as they are performed by a plurality of States which do not intend to regulate their mutual relations by this means, but to express, simultaneously or in parallel

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5/ Document A/51/10, p. 329.

6/ Idem, p. 343.

fashion, as a unitary block, the same willingness to produce certain legal effects without any need for the participation of other subjects or "parties" in the form of acceptance, reciprocity, etc.

11. The reference in the title of the topic to unilateral acts of States also means, in principle, ruling out from the purview of this study unilateral acts carried out by other subjects of international law and, in particular, the very important and varied category of such acts by international organizations. The general scheme in the Commission's report on its long-term programme of work 7/ includes, as other possible topics for future study, under the heading of the law of unilateral acts, the law applicable to resolutions of international organizations and control of their validity. Detailed treatment of unilateral acts of international organizations could thus, in due course, be considered as a possible subject for future work.

12. The Working Group bore in mind that, in the process of treaty formation, amendment, execution, termination, etc., States carry out acts which, prima facie, are unilateral in character when viewed in isolation (for example, accession, denunciation, reservation, withdrawal). The Group nonetheless considered that the characteristics and effects of such acts are governed by the law of treaties and do not need to be dealt with further in the context of the new study proposed.

13. Similar arguments were presented in discussing the possible inclusion of unilateral acts carried out by States in the context of international justice. Mention was made in particular of the characterization of acceptance of the optional clause in Article 36, paragraph 2, of the Statute of the International Court of Justice as a unilateral act. The Working Group was inclined to leave this category of acts out of the study taking the view that such acts have a treaty basis.

14. The same position was taken with regard to internal acts (laws, decrees, regulations) that do not have any effect at the international plane. However, internal acts that may have effects on the international plane, such as fixing the extent of the various kinds of maritime jurisdiction (territorial sea, contiguous zone, economic zone, baselines, etc.), should be included to the extent that such unilateral acts create legal situations which are opposable to other States and are permitted by international law.

7/ Document A/51/10, p. 329.

15. The Working Group took account of the important interaction between unilateral acts of States and custom, but preferred not to decide a priori on including or excluding acts which may be elements that could contribute to the formation of customary law. This question will need to be clarified as the study of the topic is taken further.

16. The Group also scrutinized the question of the terms used to denominate the subject of the study and, as a consequence, the necessity or advisability of changing the title of the topic. It considered the various expressions used by writers and in judicial decisions, namely, "unilateral acts", "unilateral declarations", "unilateral engagements", "unilateral obligations", "unilateral legal acts", "unilateral transactions", and so on. Mention was also made of alternatives to omit the adjective "unilateral", because of any extra-juridical connotations. At this time, it was considered that the best course was to move ahead with the substantive definition and basic characterization of the phenomenon to be analysed and to determine its juridical nature and its constituent elements. In this regard, at this initial stage the expression "unilateral legal acts of States" seems to be the one that points best to what the Commission had in mind in proposing this topic.

17. The positions taken by the Working Group on the issues mentioned in the foregoing paragraphs are of a preliminary nature, since a definitive assessment of the scope of the work to be done can be made only after a detailed analysis of all aspects of the topic.

B. Content

18. The Working Group considered that the main objective of the study is to identify the constituent elements and effects of unilateral legal acts of States and to set forth rules which are generally applicable to them, as well as any special rules that might be relevant for particular types or categories of such acts.

19. The Working Group was of the opinion that the general outline proposed in addendum 3 to the Commission's 1996 report constitutes a basis for the study that will have to be improved as work on the topic moves ahead. For the time being, the Working Group has confined itself to redrafting the outline by including a few additions in a second version which is reproduced

below, on the understanding that the further development and organization of the topic are to be dealt with in the first report that the Commission could request, as suggested in paragraph 22 below.

III. Outline for the study of unilateral legal acts of States

Chapter I. Definition of unilateral legal acts of States:

Determination of their basic elements and characteristics:

(i) Attribution of the act to a State as a subject of international law;

(ii) Unilateral nature of the act;

(iii) Normative content: expression of will, with intent to produce international legal effects;

(iv) Publicity of the expression of will;

(v) Binding force recognized by international law.

Chapter II. Criteria for classifying unilateral legal acts of States:

(i) In terms of their substantive content and their effects;

(ii) In terms of the addressee (acts addressed to one, several or all subjects of international law);

(iii) In terms of form (written or oral, explicit or tacit).

Chapter III. Analysis of the process of creation, the characteristics and the effects of the most frequent unilateral acts in State practice.

(i) Unilateral promise or engagement;

(ii) Unilateral renunciation;

(iii) Recognition;

(iv) Protest;

(v) Others.

Chapter IV. General rules applicable to unilateral legal acts:

(a) Forms:

(i) Declarations, proclamations and notifications, written or oral;

(ii) Conduct.

(b) Effects:

(i) Binding nature of the unilateral act for the author State;

(ii) Creation of rights for other States;

(iii) Renunciation of rights of the author State;

(iv) Situations of opposability and non-opposability.

(c) Applicable rules of interpretation.

(d) Conditions of validity:

(i) Capacity of State organs or agents to perform unilateral legal acts;

(ii) Effects in the international sphere (as opposed to purely internal acts);

(iii) Lawfulness under international law;

(iv) Material possible content;

(v) Publicity;

(vi) Absence of defects in the expression of will.

(e) Consequences of the invalidity of an international legal act:

(i) Nullity;

(ii) Possibility of validation.

(f) Duration, amendment and termination:

(i) Revocability. Limitations on and conditions of the power of revocation and review;

(ii) Amendment or termination because of external circumstances: Termination as a result of fundamental change of circumstances; Idem as a result of impossibility of application; Existence of a new peremptory norm;

(iii) Effects of a succession of States.

Chapter V. Rules applicable to specific categories of unilateral legal acts of States

IV. Plan of work

20. The Working Group took the view that this new topic should be considered in such a way that the first reading of a draft may be completed within the quinquennium of the present Commission.

21. To this end, the Working Group considered it advisable that the Commission should appoint a special rapporteur at the current session.

22. The Commission would then entrust the Special Rapporteur with the task of preparing a general outline of the topic which would be included in an initial report to be submitted for discussion in 1998 and which would contain:

(a) A brief description of the practice of States, past and present, with examples of the main types of unilateral legal acts that are relevant to the study;

(b) A survey of the consideration of this category of acts by international courts and of the opinions and conclusions of writers who have dealt with the topic; and

(c) A detailed scheme for the substantive development of the topic.

23. The Working Group also considered that, in preparing the initial report, the Special Rapporteur might be assisted by a small consultative group of members of the Commission, as the Commission suggested. 8/

24. After discussing the initial report at its fiftieth session, the Commission might submit it for consideration at the fifty-third session of the General Assembly, indicating how the work should continue and stating, inter alia, its views on what the outcome of the work might be: a doctrinal study, draft articles, a set of guidelines or recommendations or a combination of the above.

25. The Commission might propose in its report on the current session that the General Assembly should invite Governments to make their opinions known, both in the Sixth Committee and separately in writing, and provide as soon as possible information they consider relevant for the study of the topic: the importance, usefulness and value each State attaches to its own and others' unilateral legal acts in the international sphere; the practice and experience of each State in this regard; Government documentation and judicial decisions that should be taken into account; opinion on whether the final result should be a doctrinal report, a list of recommendations or guidelines for the conduct of States or a set of draft articles; the degree of priority or urgency that States attach to this work; commentaries and observations on the scope and content of the study; etc.

26. In subsequent reports (in early 1999, early 2000 and, possibly, early 2001), the Special Rapporteur might complete the various chapters and finalize the first full presentation of the study, proposing, as appropriate, the corresponding draft articles. This would enable the Commission to complete the first reading and submit its conclusions and recommendations to the fifty-sixth session of the General Assembly, i.e. before the term of office of the current members ends.

8/ See para. 194 of the report of the International Law Commission on the work of its forty-eighth session, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10).